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No. 86-1865

In the Supreme Court of the United States

OCTOBER TERM, 1987

LIZARDO MARQUEZ-PEREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court complied with the requirements of Fed. R. Crim. P. 11 in accepting petitioner's guilty plea.

2. Whether the district court violated Fed. R. Crim. P. 32(d) in declining to allow petitioner to withdraw his guilty plea prior to sentencing.

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OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1) is reported at 813 F.2d 409 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on February 25, 1987. On April 9, 1987, Justice Powell extended the time for filing a petition for a writ of certiorari to May 26, 1987 (Pet. App. A2). The petition was filed on May 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 19, 1984, a grand jury in the United States District Court for the Southern District of Florida indicted petitioner on a variety of narcotics charges. Petitioner was charged with conspiring to import and distribute cocaine (21 U.S.C. 963); conspiring to possess cocaine with intent to distribute it (21 U.S.C. 846); im-

porting cocaine (21 U.S.C. (& Supp. III) 952(a)); and possessing cocaine with intent to distribute it (21 U.S.C. 841(a)(1)). The charges against petitioner stemmed from his involvement in a widespread conspiracy to import cocaine from Colombia through Nicaragua into the United States (Pet. 1). The government alleged that petitioner had organized security procedures and distribution networks in the Bahamas and in Miami, Florida, to protect the members of the conspiracy as well as the cocaine and the currency in the conspirators' possession (*id.* at 20).

Petitioner pleaded not guilty to the charges. On July 29, 1985, a jury trial commenced against petitioner and three co-defendants—Carlos Bustamante, Felix Bates, and Paul Etzel (Pet. 2-3). The government made its opening statement, in which it explained the theory of its case, and began introducing evidence (*id.* at 3-4). After four days of trial, petitioner agreed to enter a plea of guilty to the first conspiracy count in exchange for a dismissal of the remaining counts of the indictment (*ibid.*). The district court then held a hearing, pursuant to Fed. R. Crim. P. 11, to ensure that the plea was knowingly and voluntarily entered (Pet. 3-4).

At the Rule 11 hearing, the court provided petitioner with a copy of the indictment and asked him to review it (Pet. 3-4). After petitioner declined the services of an interpreter,[1] the court paraphrased the charges in the first count for him (*id.* at 4). Petitioner then confirmed that he had read the entire count, that he had discussed it with his lawyer, and that he understood both the charge and what the court had said about it (*ibid.*; see also 11 S.R. 8-11).[2] The court then explained that petitioner had the right "to

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[1] According to petitioner's trial attorney (9 S.R. 26), petitioner is an intellectual, a scholar, a graduate of the Venezuelan Naval Academy, and an electrical engineer.

[2] "S.R." refers to the supplemental record on appeal.

continue with this jury trial" and "to go forward with the trial, requiring the government to prove each and every element of the Count I and the other counts * * * beyond and to the exclusion of all reasonable doubt." The court further explained that petitioner would have the right to call witnesses, "to take the witness stand and testify," to make a closing argument, and "to take an appeal from any adverse decision, if any, by the jury or by the Court." The court added that "all of these rights will be * * * given up if the Court accepts your plea of guilty." Petitioner then indicated that his attorney had advised him of his rights under American law and that he understood he was waiving those rights by entering a plea of guilty. Pet. 4-6. Petitioner also confirmed that "no one had frightened or threatened him to force him to plead guilty, and that he had not been promised anything, except the government's dismissal of the remaining counts at sentencing" (*id.* at 6). After being advised that he faced a maximum possible sentence of 15 years in jail and a fine of $25,000, petitioner agreed to enter the plea of guilty, stating that he was "convinced" of his own guilt (*ibid.*).

At the end of the hearing, the court concluded that petitioner's guilty plea was knowing and voluntary and that, based on the evidence already presented at trial, there was a factual basis for the plea (Pet. 7). Accordingly, the court accepted the plea and indicated that sentencing would take place 45 days later (*ibid.*).

2. Before the sentencing hearing, petitioner moved to withdraw his guilty plea, pursuant to Fed. R. Crim. P. 32(d) (Pet. 7). Petitioner claimed that he had been improperly pressured to plead guilty by co-defendants Bustamante and Bates, who allegedly needed petitioner's plea to form a guilty plea "package" that was acceptable to the government (*id.* at 8). In addition, petitioner claimed that he had mistakenly relied on the advice of co-defendant Etzel, who had said that petitioner could with-

draw his guilty plea at a later date (*id.* at 9). Finally, petitioner claimed that the district court had failed adequately to explain the nature of the charges against him or to advise him of the consequences of his plea—specifically, that he would be waiving his right of confrontation, that he would be waiving his right to trial in the future, and that the Parole Commission could consider the other counts on which he had been indicted in determining when he should be released from confinement on the count to which he had pleaded guilty (*id.* at 10). The district court denied petitioner's motion without a hearing (*id.* at 11).

3. On November 4, 1985, the district court sentenced petitioner to 15 years' imprisonment and a $25,000 fine (Pet. 11). The Eleventh Circuit affirmed in an unpublished judgment order (Pet. App. A1).[3]

ARGUMENT

1. Petitioner first contends (Pet. 12-34) that the decision below conflicts with decisions of other courts of appeals concerning what constitutes compliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure. This contention is meritless.

a. Contrary to petitioner's suggestion (Pet. 17-22), the First and Fifth Circuits have not held that Rule 11 requires the district court to read the entire text of the indictment to a defendant before accepting his guilty plea. Rather, like the Eleventh Circuit, the First and Fifth Circuits hold that Rule 11 merely requires that the district court have sufficient assurances that the defendant understands all the elements of the charge; that may require a reading of the indictment in some cases, but it is not always necessary. See, *e.g.*, *United States* v. *Punch*, 709 F.2d 889, 894 n.6

[3] Co-defendants Bates and Bustamante also entered guilty pleas (Pet. 7). The jury convicted Etzel, and his conviction was also affirmed on appeal (Pet. App. A1).

(5th Cir. 1983) ("This does not mean that * * * a judge must always have the indictment read in its literal form. Where a judge instead * * * furnish[es] [the defendant] with at least as complete an understanding of the charges as he would obtain from hearing the indictment read, the indictment need not be read as well."); *Mack* v. *United States,* 635 F.2d 20, 25 (1st Cir. 1980) (quoting advisory committee notes to Fed. R. Crim. P. 11, 18 U.S.C. App. at 579) ("The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant."); see also *United States* v. *Darling,* 766 F.2d 1095, 1099 (7th Cir.), cert. denied, 474 U.S. 1024 (1985); *United States* v. *Bell,* 776 F.2d 965, 968-971 (11th Cir. 1985), cert. denied, No. 85-1491 (June 23, 1986). Therefore, there is no circuit conflict on this issue.[4]

b. Nor is there a circuit conflict on the second question that petitioner raises (Pet. 23-28): whether the failure to advise a defendant that his guilty plea waives his confron-

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[4] Petitioner's real complaint (Pet. 19-20) is that, on the facts of this case, the district court did not have sufficient assurances that petitioner understood the nature of the charge to which he was pleading guilty. That fact-bound claim, rejected by both courts below, does not merit the attention of this Court. See *Goodman* v. *Lukens Steel Co.,* No. 85-1626 (June 19, 1987), slip op. 7-8; *Branti* v. *Finkel,* 445 U.S. 507, 512 n.6 (1980). In any event, the district court had such assurances: The government had discussed both the charges and its theory of the case—in petitioner's presence—in its opening statement to the jury; the court had petitioner review the indictment while the court read a paraphrased version to him during the Rule 11 hearing; the court determined that petitioner had discussed the charges with his attorney and that petitioner understood those charges; and the court discussed the allegations concerning petitioner's involvement in the conspiracy with petitioner before accepting his plea. Thus, the "core concern" of Rule 11—that the defendant understand the nature of the charge to which he is offering to plead guilty—was amply satisfied in this case. See *United States* v. *Stitzer,* 785 F.2d 1506, 1513 (11th Cir. 1986), cert. denied, No. 85-2025 (Oct. 6, 1986).

tation rights may be held harmless. The courts of appeals have uniformly held that the failure to advise a defendant of his right of confrontation may be harmless where the record provides sufficient assurances that the defendant understood that he was waiving all of the constitutional rights associated with his trial. See *United States* v. *Stead,* 746 F.2d 355, 356 (6th Cir. 1984), cert. denied, 470 U.S. 1030 (1985); *United States* v. *Guichard,* 779 F.2d 1139, 1142-1144 (5th Cir. 1986), cert. denied, No. 85-6463 (Apr. 21, 1986); *United States* v. *Carter,* 619 F.2d 293, 295 (3d Cir. 1980). Petitioner's contrary argument (Pet. 22-34) is unsupported both by the cases he cites[5] and the facts upon which he relies.[6]

c. Petitioner also errs in suggesting (Pet. 28-34) that the district court did not adequately advise him that by pleading guilty he would waive his right to a trial. The court explicitly told petitioner that entering the guilty plea would require him to waive his right to "go forward" or "to continue" with the trial, as well as "to take an appeal from any adverse decision" (*id.* at 4-5). The plain meaning of these statements is that all rights to trial—current and

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[5] Petitioner errs in suggesting (Pet. 27-28) that *United States* v. *Carter* holds that the failure to advise a defendant of his right to confrontation cannot constitute harmless error. The court there held only that it could not "assume, *from this record,* that [the defendant] was aware of this right [of confrontation] or of its full impact" and, accordingly, that it could not conclude, on that record, "that this defect in the Rule 11 proceeding was harmless" (619 F.2d at 295 (footnote omitted; emphasis added)). Such a fact-bound conclusion is a far cry from a holding that no failure to advise of the right of confrontation may be treated as harmless.

[6] Here, petitioner was represented by counsel; his counsel in fact assisted him in the conduct of the initial four days of trial; and the court expressly told petitioner that the guilty plea would result in waiver of his right to continue with the trial and all other associated constitutional rights. Thus, the record provides sufficient assurances that petitioner understood he was waiving his right of confrontation. Pet. 2-6.

future—were being waived. Perhaps petitioner subjectively believed—because of mistaken advice from Etzel—that he was waiving only his right to continue with the trial then in progress. But in response to the court's questions concerning his willingness to waive his right to trial, petitioner did not make these subjective impressions known to the court. To the contrary, he indicated that he had discussed the consequences of his plea with his attorney and that he was willing to accept them (*id.* at 6). Accordingly, the court was entirely justified in accepting petitioner's guilty plea; the court could not correct alleged misimpressions that petitioner unreasonably failed to bring to its attention at the Rule 11 hearing.

2. Petitioner further contends (Pet. 35-46) that the judgment below conflicts with decisions of other courts concerning the circumstances in which a defendant must be permitted to withdraw a guilty plea prior to sentencing. That contention is also incorrect.

As amended in 1983, Rule 32(d) of the Federal Rules of Criminal Procedure states that a district court may allow a plea to be withdrawn prior to sentencing upon a showing of a "fair and just reason." The Eleventh Circuit assesses whether a defendant has made such a showing by analyzing whether the defendant had close assistance of counsel, whether the plea was knowing and voluntary, whether the defendant's reasons for attempting to withdraw the plea are strong, whether any misunderstanding as to the collateral consequences of the plea resulted from misrepresentations by the government, whether judicial resources will be conserved, and whether the government will be prejudiced by any such plea withdrawal. See *United States* v. *Stitzer,* 785 F.2d at 1514; *United States* v. *Campbell,* 778 F.2d 764, 767 (11th Cir. 1985). The other courts of appeals follow a similar analysis in assessing whether a "fair and just reason" has been shown. See, *e.g., United States* v. *Ramos,* 810 F.2d 308, 311-313 (1st Cir. 1987);

United States v. *Benavides*, 793 F.2d 612, 616-617 (5th Cir. 1986), cert. denied, No. 86-5325 (Oct. 6, 1986); *United States* v. *Martinez*, 785 F.2d 111, 114-115 (3d Cir. 1986); *United States* v. *Haley*, 784 F.2d 1218, 1219 (4th Cir. 1986); *United States* v. *Dixon*, 784 F.2d 855, 856-857 (8th Cir. 1986); *United States* v. *Read*, 778 F.2d 1437, 1440 (9th Cir. 1985), cert. denied, No. 85-6972 (Oct. 6, 1986); *United States* v. *Fountain*, 777 F.2d 351, 358 & n.3 (7th Cir. 1985), cert. denied, 475 U.S. 1029 (1986). See also *United States* v. *Kearney*, 684 F.2d 709, 711 (10th Cir. 1982). In short, the courts apply the same standards in determining whether a district court has abused the discretion conveyed by Rule 32(d) in refusing to allow withdrawal of a guilty plea.[7]

In any event, the district court's refusal here to vacate petitioner's guilty plea could not be held an abuse of discretion under any reasonable interpretation of Rule 32(d). Petitioner waited almost two and one-half months before attempting to withdraw his plea. When he finally did so, he asserted only that his co-defendants had pressured him into pleading guilty; he did not allege that either his lawyer or the government had coerced or induced him into doing so.[8] Moreover, although he claimed that his

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[7] The cases on which petitioner relies (Pet. 37-38) are inapposite because they involve the standard that was contained in Rule 32(d) before it was amended in 1983. See *United States* v. *Haley*, 784 F.2d at 1219.

[8] In the cases on which petitioner relies (Pet. 41), the defendants' lawyers coerced the defendants into pleading guilty by providing the defendants with erroneous information. No such pressure was involved—or even alleged—here. Moreover, petitioner did not allege that his co-defendants threatened to harm him if he did not plead guilty. Rather, he asserted only that they asked him to enter into a "package deal" involving three defendants.

plea should be vacated because he had entered it on a co-defendant's advice that he could later withdraw it, petitioner had competent counsel at the time and never asked that lawyer, much less the court, whether the co-defendant's advice was mistaken. Finally, the government would have been substantially prejudiced if petitioner had been allowed to withdraw his guilty plea. The trial involving petitioner's co-defendants was completed by the time petitioner moved to have his plea vacated; the government therefore would have had to subpoena anew the various witnesses who testified about events that took place in four countries. To require a court to permit the withdrawal of a plea of guilty under these circumstances would give a person in petitioner's position a ready means of obtaining a severance and a new trial if he did not like the way his first trial was progressing. He could simply enter a plea of guilty during the trial and then insist on his right to withdraw his plea after the trial had been completed but before he had been sentenced. Absent special circumstances showing that the motion to withdraw is justified, defendants should not be given the means to disrupt the criminal justice process in this manner. Under the circumstances of this case, petitioner simply cannot establish that any "fair and just reason" for withdrawing his guilty plea exists.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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